

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 19-580V

Filed: February 24, 2022

* * * * *

JESSICA SCHEYDER *on behalf* *
of J.H.S., *

UNPUBLISHED

Petitioner, *

v. *

Attorneys' Fees and Costs

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

* * * * *

Brian L. Cinelli, Marcus & Cinelli, LLP, Williamsville, NY, for petitioner.

Benjamin P. Warder, U.S. Department of Justice, Washington, DC, for respondent.

DECISION ON ATTORNEYS' FEES AND COSTS¹

Roth, Special Master:

On April 17, 2019, Jessica Scheyder ("petitioner") filed a petition pursuant to the National Vaccine Injury Compensation Program on behalf of her minor child, J.H.S.² Petitioner alleged that J.H.S. suffered from acute disseminated encephalomyelitis after receiving an influenza vaccination on April 18, 2016. *See* Petition (ECF No. 1). After attempting to obtain an expert to file a report, petitioner filed an unopposed motion to dismiss her petition on June 10, 2021. (ECF No. 29). On the same day, the undersigned dismissed the petition for insufficient proof. (ECF No. 30).

¹ The undersigned intends to post this Decision on the United States Court of Federal Claims' website. **This means the decision will be available to anyone with access to the Internet.** In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to redact medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, the undersigned agrees that the identified material fits within this definition, the undersigned will redact such material from public access. Because this unpublished ruling contains a reasoned explanation for the action in this case, the undersigned is required to post it on the United States Court of Federal Claims' website in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2012) (Federal Management and Promotion of Electronic Government Services).

² National Childhood Vaccine Injury Act of 1986, Pub L. No. 99-660, 100 Stat. 3755.

On October 31, 2021, petitioner filed an application for final attorneys' fees and costs. ("Fees App.") (ECF No. 38). Petitioner requests total attorneys' fees and costs in the amount of \$40,771.59, representing \$23,485.00 in attorneys' fees and \$17,286.59 in costs. Fees App. at 5. Pursuant to General Order No. 9, petitioner has indicated she has not personally incurred any costs in pursuit of this litigation. Fees App. Ex. 10. Respondent responded to the motion on November 29, 2021, stating "Respondent is satisfied the statutory requirements for an award of attorneys' fees and costs are met in this case" and requesting that the undersigned "exercise her discretion and determine a reasonable award for attorneys' fees and costs." Response at 2 (ECF No. 36). Petitioner did not file a reply thereafter.

This matter is now ripe for consideration.

I. Legal Framework

The Vaccine Act permits an award of "reasonable attorneys' fees" and "other costs." § 15(e)(1). If a petitioner succeeds on the merits of their claim, the award of attorneys' fees is automatic. *Id.*; see *Sebelius v. Cloer*, 133 S. Ct. 1886, 1891 (2013). However, a petitioner need not prevail on entitlement to receive a fee award as long as the petition was brought in "good faith" and there was a "reasonable basis" for the claim to proceed. § 15(e)(1). Here, although petitioner's case was ultimately dismissed, the undersigned is satisfied that the claim was filed in good faith and maintained a reasonable basis throughout. Respondent also has not advanced any argument challenging the good faith or reasonable basis of the claim. Accordingly, petitioner is entitled to a final award of reasonable attorneys' fees and costs.

The Federal Circuit has endorsed the use of the lodestar approach to determine what constitutes "reasonable attorneys' fees" and "other costs" under the Vaccine Act. *Avera v. Sec'y of Health & Human Servs.*, 515 F.3d 1343, 1349 (Fed. Cir. 2008). Under this approach, "an initial estimate of a reasonable attorneys' fees" is calculated by "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Id.* at 1347–48 (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). That product is then adjusted upward or downward based on other specific findings. *Id.*

Special masters have substantial discretion in awarding fees and may adjust a fee request *sua sponte*, apart from objections raised by respondent and without providing petitioners with notice and opportunity to respond. See *Sabella v. Sec'y of Health & Human Servs.*, 86 Fed. Cl. 201, 209 (2009). Special masters need not engage in a line-by-line analysis of petitioner's fee application when reducing fees. See *Broekelschen v. Sec'y of Health & Human Servs.*, 102 Fed. Cl. 719, 729 (2011).

II. Discussion

A. Reasonable Hourly Rate

A "reasonable hourly rate" is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Avera*, 515 F.3d at 1348 (quoting *Blum*, 465 U.S. at 896 n.11). In general, this rate is based on "the forum rate for

the District of Columbia” rather than “the rate in the geographic area of the practice of petitioner's attorney.” *Rodriguez v. Sec'y of Health & Human Servs.*, 632 F.3d 1381, 1384 (Fed. Cir. 2011) (citing *Avera*, 515 F. 3d at 1349). There is a “limited exception” that provides for attorney's fees to be awarded at local hourly rates when “the bulk of the attorney's work is done outside the forum jurisdiction” and “there is a very significant difference” between the local hourly rate and forum hourly rate. *Id.* This is known as the *Davis County* exception. See *Hall v. Sec'y of Health & Human Servs.*, 640 F.3d 1351, 1353 (2011) (citing *Davis Cty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. U.S. EPA*, 169 F.3d 755, 758 (D.C. Cir. 1999)).

For cases in which forum rates apply, *McCulloch* provides the framework for determining the appropriate hourly rate range for attorneys' fees based upon the attorneys' experience. See *McCulloch v. Sec'y of Health & Human Servs.*, No. 09–293V, 2015 WL 5634323 (Fed. Cl. Spec. Mstr. Sept. 1, 2015). The Office of Special Masters has accepted the decision in *McCulloch* and has issued a Fee Schedule for subsequent years.³

Petitioner requests that her attorney, Mr. Brian Cinelli, be compensated at \$300.00 per hour for all work performed in this case from 2017 to 2021. These rates are consistent with what Mr. Cinelli has previously been awarded for his Vaccine Program work, and the undersigned finds them to be reasonable herein for work performed in the instant case.

B. Hours Reasonably Expended

Attorneys' fees are awarded for the “number of hours reasonably expended on the litigation.” *Avera*, 515 F.3d at 1348. Counsel should not include in their fee requests hours that are “excessive, redundant, or otherwise unnecessary.” *Saxton ex rel. Saxton v. Sec'y of Health & Human Servs.*, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). “Unreasonably duplicative or excessive billing” includes “an attorney billing for a single task on multiple occasions, multiple attorneys billing for a single task, attorneys billing excessively for intra office communications, attorneys billing excessive hours, [and] attorneys entering erroneous billing entries.” *Raymo v. Sec'y of Health & Human Servs.*, 129 Fed. Cl. 691, 703 (2016). While attorneys may be compensated for non-attorney-level work, the rate must be comparable to what would be paid for a paralegal or secretary. See *O'Neill v. Sec'y of Health & Human Servs.*, No. 08–243V, 2015 WL 2399211, at *9 (Fed. Cl. Spec. Mstr. Apr. 28, 2015). Clerical and secretarial tasks should not be billed at all, regardless of who performs them. See, e.g., *McCulloch*, 2015 WL 5634323, at *26. Hours spent traveling are ordinarily compensated at one-half of the normal hourly attorney rate. See *Scott v. Sec'y of Health & Human Servs.*, No. 08–756V, 2014 WL 2885684, at *3 (Fed. Cl. Spec. Mstr. June 5, 2014) (collecting cases). And “it is inappropriate for counsel to bill time for educating themselves about basic aspects of the Vaccine Program.” *Matthews v. Sec'y of Health & Human Servs.*, No 14–1111V, 2016 WL 2853910, at *2 (Fed. Cl. Spec. Mstr. Apr. 18, 2016). Ultimately, it is “well within the Special Master's discretion to reduce the hours to a number that, in [her] experience and judgment, [is] reasonable for the work done.” *Saxton*, 3 F.3d at 1522. In exercising that discretion, special masters may reduce the number

³ The 2015-2021 Fee Schedules can be accessed at <http://www.cofc.uscourts.gov/node/2914>. The hourly rates contained within the schedules are updated from the decision in *McCulloch v. Sec'y of Health & Human Servs.*, No. 09-293V, 2015 WL 5634323 (Fed. Cl. Spec. Mstr. Sept. 1, 2015).

of hours submitted by a percentage of the amount charged. *See Broekelschen*, 102 Fed. Cl. at 728–29 (affirming the Special Master's reduction of attorney and paralegal hours); *Guy v. Sec'y of Health & Human Servs.*, 38 Fed. Cl. 403, 406 (1997) (same).

Upon review, the overall hours spent on this matter appear to be reasonable. The undersigned has reviewed the billing entries and finds that the billing entries adequately describe the work done on the case and the amount of time spent on that work. None of the entries appear objectionable, nor has respondent identified any entries as objectionable. Accordingly, petitioner is entitled to a final award of attorneys' fees in the amount of \$23,485.00.

C. Reasonable Costs

Like attorneys' fees, a request for reimbursement of attorneys' costs must be reasonable. *Perreira v. Sec'y of Health & Human Servs.*, 27 Fed. Cl. 29, 34 (Fed. Cl. 1992). Petitioner requests a total of \$17,286.59 in costs for acquiring medical records, postage, the Court's filing fee, and work performed by petitioner's medical expert, Dr. Robert Shuman. The costs for medical records, postage, and filing fee are reasonable and shall be fully reimbursed. The expert costs, which make up the majority of the amount requested, require further discussion.

Dr. Shuman's invoice indicates that he has billed a total of 40.25 hours at \$400.00 per hour. The undersigned finds the hourly rate reasonable and consistent with what Dr. Shuman has previously been awarded in other Vaccine Program cases. *See, e.g., Rodela v. Sec'y of Health & Human Servs.*, No. 17-236V, 2020 WL 583841, at *3 (Fed. Cl. Spec. Mstr. Jan. 10, 2020). However, some of the hours billed are excessive and vague. For example, Dr. Shuman billed 12.5 hours to "Write" without any indication of what he was writing. Fees App. Ex. 6 at 1. These entries would be more understandable had Dr. Shuman submitted a written expert report into the case record. However, no such report was filed, and petitioner has previously indicated that she was unable to find an expert that would support causation in her case. Status Report, filed March 26, 2021 (ECF No. 27). Such vague billing entries fall short of the standard prescribed by the Guidelines for Practice Under the National Vaccine Injury Compensation Program, which states, in reference to expert expenses, that "the expert's services must be identified *with particularity* in contemporaneous, dated records indicating the amount of time spent on each task. Guidelines at 71 (emphasis added).⁴

Ultimately, the undersigned cannot reimburse this time for writing when it is unclear what Dr. Shuman was writing that necessitated 12.5 hours and no expert report was ever filed. The undersigned will therefore reduce \$5,000.00 from the final award of attorneys' costs. Petitioner is awarded final costs of \$12,286.59.

III. Conclusion

In accordance with the foregoing, petitioner's motion for attorneys' fees and costs is **GRANTED**. The undersigned hereby awards **a lump sum of \$35,771.59, representing reimbursement for petitioner's attorneys' fees and costs, in the form of a check payable jointly to petitioner and Mr. Brian Cinelli.**

⁴ The Guidelines are available at: www.uscfc.uscourts.gov/sites/default/files/Guidelines-4.24.2020.pdf.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court shall enter judgment in accordance herewith.⁵

IT IS SO ORDERED.

s/Mindy Michaels Roth

Mindy Michaels Roth

Special Master

⁵ Entry of judgment can be expedited by each party's filing of a notice renouncing the right to seek review. Vaccine Rule 11(a).